

IN THE COURT OF APPEAL OF TANZANIA

AT ZANZIBAR

(CORAM: MBAROUK, J.A., MKUYE, J.A., And WAMBALI, J.A.)

CIVIL APPEAL NO. 262 OF 2017

DIAMOND TRUST BANK TANZANIA LTD.....APPELLANT

VERSUS

IDRISA SHEHE MOHAMEDRESPONDENT

**(Appeal from the judgment and decree of the High
Court of Zanzibar, at Vuga)**

(Mkusa, J.)

dated the 11th day of July, 2017

in

Civil Case No 31 of 2016

RULING OF THE COURT

11th & 14th December, 2018

MBAROUK, J.A.:

This is an appeal arising from the judgment and
decree of the High Court of Zanzibar in Civil Case No.
31 of 2016 dated the 11th day of July, 2017. The main

claim between the parties was founded on banker-customer relationship where by the respondent who was the plaintiff in the trial filed the suit claiming against the appellant who was a defendant for a declaration that the usurious and exorbitant rate of penalty interest being charged by the appellant on the respondent's account is unlawful and unconscionable and in the result should be set aside. He also claimed an order directing the appellant to render true and full accounts to the respondent, a specific damages to the tune of Tshs. 26,320,200,000/= (Twenty Six Billions, Three Hundreds Twenty Millions, Two Hundred Thousand) for the breach of contract and general damages of Tshs. 150,000,000/= (One Hundred and Fifty Millions) due to harassment caused by the appellant.

In the High Court, the trial proceeded ex parte after the appellant failed to file the written statement of defence within the twenty one days in compliance with the law, hence the trial court proceeded to enter the default judgment in favour of the respondent and ordered the following:-

a)A declaration that the usurious and exorbitant rate of penalty interest being charged by the defendant on the plaintiffs account is unlawful and unconscionable and in the result, is hereby set aside,

b)An order directing 1st defendant to render true and full account to the plaintiff.

c)An order directing the 1st defendant to pay the plaintiff special damages

of 26,320,200,000/= (Shilling Twenty Six Billions, three hundred twenty million, two hundred thousand) for breaching the contract.

d) General damages due to harassment caused to the applicant/plaintiff to the tune of sum of 150,000,000/= (Hundred and Fifty Million only).

Aggrieved by the decision of the High Court, the appellant is before the Court with five grounds of appeal framed as follows:-

"i. The High Court erred in law in entertaining a suit based on special damages which were not properly pleaded making the court to have no pecuniary jurisdiction.

- ii. That the court erred in law in continuing with the main suit without a specific order from the chief justice to hear and determine the suit.*
- iii. That the court erred in law in refusing to grant extension of time to file a WSD on the first application for such extension.*
- iv. That the court erred in law in entertaining the Default Judgment as prayed without requiring specific proof of the special damages claimed or subjecting the claim to scrutiny.*
- v. That general (sic) the High Court decision is otherwise bad in law."*

At the hearing of the appeal, the appellant was represented by Mr. Salim Mnkonje, learned advocate

while the respondent was in the services of Mr. Rajab Abdalla Rajab, learned advocate.

Mr. Rajab prayed before the Court to make his submissions only on the 2nd ground of appeal. He pointed out that, other grounds cannot be argued due to the fact that the 2nd ground of appeal is pertinent. He submitted that, the proceeding of the trial court from 15/05/2017 to the end of trial are void and a nullity because Mkusa, J. acted without instruction from the Chief Justice. He pointed out that, the learned trial judge was assigned to deal only with the application for interlocutory orders after the respondent's action of rejecting several judges.

He further submitted that, the court record clearly shows that, Mkusa, J. was not assigned to deal with the main suit and therefore, he could not have

proceeded to hear and make determination on it. He pointed out that, page 144 of the record of appeal it shows that Mkusa, J. had earlier refused a prayer for a default judgment on the ground that he had not been assigned with the main case. Mr. Rajab added that, after reply to the respondent's written submissions, there was no specific order from Chief Justice assigning Mkusa, J. to hear the main suit. He said, this is against the directions given by section 13 of **High Court Act** No. 2 of 1985, therefore Mkusa, J. acted without powers and hence proceedings at page 146 of the record of appeal dated 15/5/2017 up to 11/07/2017 were a nullity.

He then prayed for the Court to invoke its revisional powers conferred under section 4(2) of the Appellate Jurisdiction Act, [Cap. 141 R.E 2002], to nullify all the proceedings commencing from

15/05/2017 onwards up to 11/07/2017 and order retrial.

On his part, Mr. Mnkonje submitted that upon the concession made by his learned friend Mr. Rajab that there was no order which assigned the suit to Mkusa, J. and hence all the proceeding after 15/05/2017 should be nullified and order retrial with costs.

In a brief rejoinder about the issue of cost, Mr. Rajab objected the prayer for costs on the ground that he didn't waste the Court's time and prayed for the costs to follows the event.

On our part, we agree with the submissions made by both learned counsel as it is very much clear that the procedure of all cases before the High Court of Zanzibar are supposed to be assigned to a judge by

the Chief Justice and this position is supported by section 13 of **High Court Act**, No 2 of 1985 which provides as follows:-

"The Chief Justice shall regulate the distribution of business in the Court and all actions and proceedings before the court shall be heard and determined by a single judge, unless the Chief Justice otherwise directs or where the law provides otherwise".

As per the above cited section, this means, the Chief Justice gives a specific order on what a particular judge should deal with. In the present appeal, Mkusa, J. was assigned to deal with the application for interlocutory orders after withdrawal of Issa, J. The record shows that, what was before Issa, J. was an application for an interim order of restraining the

appellant and their agents from selling the respondent's residential property registered vide Registration No. 993 in Vol IV of Block A-3 situated at Shakani area.

It is a fact that Mkusa, J. was not assigned to deal with the suit by the Chief Justice and he further admitted that he was not assigned to hear the main suit as seen at page 144 of the record of appeal, as shown hereunder as follows: -

"Court: *At this stage of proceedings request of advocate Ramadhani is not maintainable because I was assigned to hear application not main suit. Therefore I cannot make such order at this stage.*

Sgd. Mkusa, I. Sepetu J.

30/01/2017"

Mkusa, J. further went on to allow the filing of the amended plaint. He acted without instruction from the Chief Justice and hence lacked powers to deal with the main case.

We wish to point out that, the Court cannot normally justifiably close its eyes on a glaring illegality in any particular case because it has a duty of ensuring proper application of the laws by the subordinates courts, See the case of **Marwa Mahende v. Republic**, [1998] T.L.R 249.

Also in the case of **Tryphone Elias @ Ryphones Elias & Another v. Majaliwa Daudi Mayaya**, Civil Appeal No. 186 of 2017 CAT (unreported) it was held as follows:

"We think, however, that there is nothing improper about this. The duty of the Court is to apply and interpret the laws of the country. The superior courts have the additional duty of ensuring proper application of the laws by courts below."

Drawing an inspiration from the cited decision, we are of the firm view that for the interest of justice, the Court has a duty to address a vivid illegality and that it cannot justifiably close its eyes thereof.

Therefore, the circumstance in the instant case are such that we should intervene, because the illegality pointed out goes to the jurisdiction of the court. That entails that at the end of it all, the decision

of the High Court will not escape the wrath of being nullified.

Having said that the illegality which ensured goes to the jurisdiction of the court, and as the trial judge determined the main suit without any instruction from the Chief Justice, as required by the law, we invoke our revisionary powers under section 4(2) of the Appellate Jurisdiction Act, Cap. 141, R.E. 2002 and quash that part of the proceedings from 15/05/2017 where Mkusa, J. started hearing the main suit to the end of trial, and set aside the default judgment thereof and the resultant orders. We remit the record to the High Court with the direction that the trial continues from 15/05/2017 where the main suit was supposed to start, before another judge to be assigned by the Chief Justice.

In the circumstances of this case, we order each party to bear its own costs. We so order.

DATED at **ZANZIBAR** this 13th day of December, 2018.

M. S. MBAROUK
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

I certify that this is a true copy of the original.




B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL